

August 28, 2007

Mr. Merritt Wallick
Public Service Editor
The News Journal
P.O. Box 15505
Wilmington, DE 19850

Re: **Freedom of Information Act Complaint
Against Kent County Levy Court**

Dear Mr. Wallick:

On May 15, 2007, our Office received your complaint alleging that the Kent County Levy Court (“the County”) violated the public record requirements of the Freedom of Information Act, 29 *Del. C.* Ch. 100 (“FOIA”), by charging you an unreasonable fee to reproduce electronic data.

By letter dated May 8, 2007, you made a FOIA request to the County for “a copy of the property and tax assessment records including the same fields you have supplied us in the past, most recently in January. Please consider this a recurrent request. We would like to receive an update of the files during the first week of every month.”

By letter dated May 14, 2007, the County responded: “[I]t is the determination of the Levy Court to hold the News Journal Company to Kent County Fee Ordinance 04-05. The cost to provide you with the information you are requesting remains \$.06 per record for 80,000 records and computer operation time of \$60.00 an hour.”

By letter dated May 17, 2007, our Office asked the County to respond to your complaint in writing by May 30, 2007. Our Office granted the County's request for an extension of time until June 8, 2007. Our Office granted a second extension of time because of a family emergency for the County's legal counsel. Our Office received the County's response on June 25, 2007.

The County provided our Office with a copy of Ordinance 04-05 adopted on March 23, 2004.

The Ordinance sets forth fees for producing information stored in computer databases:

Cost of Producing Computer-Generated Copies. The cost of producing mailing labels based upon the contents of the County's automated tax rolls is and shall be \$0.06 per label. The cost of producing a name and address listing based upon the contents of the County's automated tax rolls is and shall be \$0.06 per name/address. If information stored in computer data bases is requested to be transferred to magnetic media, such as computer tape or floppy diskette, the requesting party must supply the computer tape or floppy diskette of appropriate size. Any additional out-of-pocket cost incurred by the County shall be invoiced at the County's actual cost.

Cost for Machine Operating Time. In addition to the cost of producing computer-generated copies specified by paragraph above, a further reproduction fee shall be charged based upon the amount of machine operating time necessary to produce said copies, and shall be calculated at the rate of \$60.00 per hour. The minimum charge shall be \$15.00. Whenever the cost of producing computer-generated copies, based upon the amount of machine operating time necessary to produce such copies, is expected to exceed \$50.00, a fifty percent (50%) deposit must be provided by the requesting party before processing of the information request may commence.

Cost for Computer Programming. In addition to the cost of computer-generated copies specified above and the cost for machine operating time also specified above, a further reproduction fee shall be charged based upon the amount of computer programming (if any) required to produce said copies, and shall be calculated at the rate of \$60.00 per hour. The minimum charge shall be \$60.00. Whenever the cost of producing computer-generated copies, based upon the amount of computer programming (if any) required to produce said copies, is

expected to exceed \$50.00, a fifty percent (50%) deposit must be provided by the requesting party before processing of the information request may commence.

The County contends that to retrieve and reproduce the electronic data you requested would require the County to create a new public record which FOIA does not require.

The News Journal request requires the County to manipulate the data into a format requested by the News Journal along with explanations and translations of codes used in the data. The tax information data is in an electronic format, but the raw data is not usable. The files must be manipulated by the IT programmer in order to provide information so that it is readily understood. A query must be run to determine from which database the information is accessed. The IT programmer must link the databases together for the data to be useful. Each record could contain numerous pages of information. The volume of information provided could be one page or twelve pages. It must be translated from AS400 – EDCDIC to a PC readable or common ACSII file.

If reproducing the information you requested would not amount to creating a new public record, the County contends that the fees it would charge under Ordinance 04-05 (in excess of \$4,800) are reasonable under FOIA.

On July 17, 2007, representatives from our Office met with representatives of the County (including Information Technology staff) for us to better understand what property tax assessment data the County maintains, in what form, and what is involved in retrieving and reproducing the electronic data you requested. After that meeting, our Office requested supplemental information from the County which we received on July 23, 2007.

The County has a fixed price service contract with a private vendor, Affiliated Computer Services (“ACS”), to manage the County’s property tax assessment databases, which are housed on a mainframe computer owned by the County. There are four databases. Two are “flat” files (one

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for commercial properties, the other for residential properties) containing such information as the name of the owner, lot number, map identification number, land value, sales value, *etc.* There are two other, relational databases maintained by ACS: a land management system (containing information like assessed value, school district, sewer district); and a tax billing record database.

In response to your earlier FOIA request, ACS converted the residential and commercial flat files into a comma delimited file and put the data onto a CDROM so that you could import it into a program like Access for analysis. The County charged you \$85.00 for that information.

Your May 8, 2007 FOIA request asked the County for a recurring monthly update of that same information. In addition, you requested "tax assessment records," which the County interprets (after discussion with you) to mean the property taxes billed and paid by owner. According to the County, to compile tax billing information by owner would require extensive computer programming to pull data from all four property databases to provide information for a specific property such as name of owner, tax paid, and delinquent file.

RELEVANT STATUTES

FOIA provides that "[a]ll public records shall be open to inspection and copying by any citizen of the State during regular business hours by the custodian of the records for the appropriate public body. 29 *Del. C.* §10003(a).

FOIA provides that "[a]ny reasonable expense involved in the copying of such records shall be levied as a charge on the citizen requesting such copy" *Id.* "It shall be the responsibility of the public body to establish rules and regulations regarding access to public records as well as fees charged for copying of such records." *Id.* §10003(b).

LEGAL ANALYSIS

A. Creation Of A New Public Record

In *Att’y Gen. Op.* 06-IB17 (Aug. 21, 2006), The News Journal made a FOIA request to the Public Integrity Commission (“PIC”) for lobbying expense and financial disclosure reports in electronic form. The newspaper asked for a comma separated text file (CSV) of the tables of the database and the information on lobbying and financial disclosure housed within those tables. The CSV files could then be imported into a software program like Access to make the data searchable.

Our Office determined that FOIA required the PIC to produce the electronic database after redacting non-public information like user identification numbers and passwords. Our Office, however, determined that FOIA did not require the PIC to convert the existing information from a relational database system into multiple CSV files because that would require “‘manipulation or restructuring of the substantive content of a record.’” *Att’y Gen. Op.* 06-IB17 (quoting *Yaeger v. Drug Enforcement Administration*, 678 F.2d 315, 323 (D.C. Cir. 1982)). *See also Att’y Gen. Op.* 04-IB14 (June 28, 2004) (FOIA did not require a school district to “‘produce computerized data in a special format requested by a citizen’ through ‘a search of the online database, accomplished by entering the requesting party’s search criteria’” (quoting *Gabriels v. Curiale*, 628 N.Y.S.2d 882, 993 (App. Div. 1995))).

In *Att’y Gen. Op.* 06-IB17 our Office concluded “that FOIA does not require the Commission to convert its electronic database from a relational database into CSV (comma separated) files. That would amount to the creation of a new public record which FOIA does not require.”

In response to an earlier FOIA request by you, ACS created a computer program to convert the residential and commercial property assessment files into comma separated files. Since that

computer program already exists, providing you with a monthly update of that information in our opinion would not amount to the creation of a new public record. *See Att’y Gen. Op.* 06-IB17 (“if the clerk’s computer were already programmed to produce the desired print-out, the ‘document’ would already exist for the purpose of a [FOIA] request.”) (quoting *State ex rel. Kerner v. State Teachers Retirement Board*, 695 N.E.2d 256, 257 (Ohio 1998 (per curiam))).

Of course, there may be additional production costs associated with setting up an automated system for delivering that information to you on a monthly basis as you requested. If so, under FOIA the County can charge a reasonable fee for the direct costs associated with the production of that information consistent with the remainder of this opinion.¹

As for the tax billing information you most recently requested, our Office is satisfied that to provide you with such information would require extensive computer programming to create a new public record which FOIA does not require. “[R]equiring agencies to write computer programs not needed for carrying out agency functions in response to FOIA requests would transform the government into a giant computer research firm captive to the whims of individual requestors at great public expense.” *Kele v. United States Parol Commission*, Civ.No. 85-4058 (D.D.C. 1986).

B. Reasonable Fees

¹ The County suggests it should not have to provide you with property tax assessment information from the databases managed by ACS because that same information is available on the County’s website (www.co.kent.de.us.PRIDE). Under FOIA, those electronic databases are a public record “separate and distinct” from whatever information may be posted on the County’s website. *Att’y Gen. Op.* 06-IB17 (Aug. 21, 2006). “Under FOIA, a public body cannot respond to a request for information in electronic form by supplying [other] records that contain the same information.” *Id.*

In previous opinions, our Office has determined what a public body may charge for copying paper records under FOIA. *See, e.g., Att’y Gen. Op.* 06-IB09 (Apr. 25, 2006) (adopting “as a benchmark of reasonableness, ‘what the courts in Delaware now charge (Superior Court, \$1.50 per page; Family Court, \$1.50 per page)’” (quoting *Att’y Gen. Op.* 05-IB06 (Mar. 9, 2005))). ²

Our Office has suggested that to reproduce electronic data a public body may “charge for the cost of retrieving information from computer databases.” *Att’y Gen. Op.* 02-IB10 (Apr. 24, 2002). But we have never addressed specifically what expenses a public body can recoup for retrieving and reproducing electronic data.

Because there is no Delaware case law on point, our Office looks to the federal FOIA (as we have done in the past) for guidance to determine what is a reasonable fee under Delaware’s FOIA to retrieve and reproduce information in electronic form.

Under the federal FOIA, federal agencies can charge fees for the “direct costs of document search and duplication.” 5 U.S.C. §552(a)(4)(A). Congress included this section in the “Act in order to reduce the burdens imposed on the agencies.” *Kissinger v. Reporters Committee for Freedom of the Press*, 445 U.S. 136, 154 (1980).

In 1986, Congress amended the federal FOIA to provide a consistent, government-wide framework for the calculation and collection of fees. Freedom of Information Reform Act of 1986, Pub.L. No. 99-570, 100 Stat. 3207-44. To accomplish that goal, in 1987 the federal Office of Management and Budget (“OMB”) issued guidelines for all federal agencies. Uniform Freedom of

² We note that fees like \$1.00 per page necessarily include the labor costs of retrieving and photocopying the paper records because the actual cost of paper and toner most likely is considerably less.

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Information Act Fee Schedule and Guidelines, Pub.L. No. 99-570, 52 Fed.Reg. 10012, 1987 WL 132571 (Mar. 27, 1987) (“OMB Guidelines”).

The OMB Guidelines provide that fees for retrieving and copying electronic data should include both labor and computer programming costs. “[FOIA] permits agencies to charge only for allowable reasonable and direct costs of providing certain FOIA services. Employee salaries are clearly a direct cost of providing FOIA services. The cost to the agency of conducting, for example, a search for a document is the salary that must be paid to the employee performing the search multiplied by the time he or she spends searching.” 52 Fed.Reg. at 10013. The OMB Guidelines, however, do not permit a federal agency to recoup any indirect costs associated with retrieving and copying electronic data “such as costs of space, and heating and lighting the facility in which the records are stored.” *Id.*

The OMB Guidelines encourage federal agencies “to establish agency-wide average computer processing unit operating costs and operator/programmer salaries for purposes of determining fees for computer searches where they can reasonably do so because these costs are relatively uniform across the agency.” *Id.* at 10015. “This will include the cost of operating the central processing unit (CPU) for that portion of operating time that is directly attributable to searching for records responsive to a FOIA request and operator/programmer salary apportionable to the search. When agencies can establish a reasonable agency-wide average rate for CPU operating costs and operator/programmer salaries involved in FOIA searches, they may do so and charge accordingly” 52 Fed.Reg. at 10018.

Our Office accepts the federal OMB Guidelines as a reasonable standard for purposes of

determining what is a reasonable fee under Delaware's FOIA for retrieving and copying electronic data.

To charge for labor and computer processing time, a public body must have a written policy in place. *See 29 Del. C. §10003(b); Att'y Gen. Op. 02-IB10* (Apr. 24, 2002) (School District did "not have a written rule regarding charges for the cost of retrieving information from computer databases"). The purpose of requiring a written policy "is to make it easy for a citizen to know in advance how much it will cost to have public records copied and to ensure uniform treatment." *Att'y Gen. Op. 04-IB08* (Mar. 9, 2004).

The County has a written policy for charging fees for retrieving and reproducing electronic data (Ordinance 04-05) which includes \$60.00 per hour for labor. Our Office believes that is a reasonable cost recovery fee under FOIA for purposes of responding to your request to copy electronic data. According to the County, the hourly rate under the services contract with ACS is approximately \$75.00 per hour.³ The County, therefore, is charging less than the actual direct costs of labor to retrieve and reproduce electronic data.

Our Office, however, does not believe that the County has met its burden of proof to justify

³ Our Office believes that under FOIA a public body "may choose to employ the services of a private contractor to respond to a request for copies of public records so long as the decision to do so is reasonable. For instance, the decision to employ the services of a private contractor cannot be used to make it more difficult or create an unreasonable obstacle for the individual seeking to obtain copies of the public records. If, however, the public office has limited photocopying resources or labor, then it would be reasonable for the public office to employ the services of a private contractor." *State ex rel. Gibbs v. Concord Township Trustees*, 787 N.E.2d 1248, 1254 (Ohio App. 2003). Our Office believes it is reasonable for the County to use ACS to process your FOIA request when the County does not have the in-house expertise to run the necessary computer programs.

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charging you \$60.00 per hour for machine operating time. In processing your FOIA request for electronic data, the County may in fact incur incremental costs for computer time, costs which we believe FOIA authorizes a public body to recover by charging a reasonable fee. But the County has not explained to our satisfaction the basis for the \$60.00 hourly fee in Ordinance 04-05 for machine operating time. According to the County, “[t]he source of the \$60 per hour charge is information provided by the former director of ACS.” We do not believe that explanation satisfies the County’s burden of proof under FOIA to justify this cost recovery fee in processing your FOIA request. The County has not shown any correlation between the hourly charge and the actual computer time which would be involved in processing your FOIA request.

Our Office also does not believe that it is reasonable under FOIA for the County to charge – in addition to labor costs – six cents per “record” for the property tax assessment information you requested. The County contends that each of the approximately 80,000 fields in the property tax assessment databases constitutes a separate “record” for purposes of FOIA so the charge to you would be \$4,800.

The County’s ordinance only provides for charging six cents “per label” for producing mailing labels “based on the contents of the County’s automated tax rolls” and six cents “per name/address” for “producing a name and address listing based on the County’s automated tax rolls.” That may be a reasonable fee since the cost of buying and printing out adhesive mailing labels is analogous to photocopying discrete paper records.

An electronic database, however, bears little resemblance to paper records. An electronic

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database is more like an information pool rather than a set of discrete documents.⁴ Our Office does not believe it is reasonable for the County to charge a fixed fee for each electronic data field you requested as it might assess a per-page fee to copy paper records. The County has not satisfied its burden of proof under FOIA to show that charging six cents for each of the thousands of fields of data in its electronic property tax assessment databases correlates to any actual costs (in addition to labor and computer time) which the County might incur in processing your FOIA request.

⁴ "As information technology evolves, records become more difficult to conceptualize in terms of discrete, tangible documents. . . . The concept of database is replacing the concept of 'record' *per se*. It thus becomes increasingly difficult to establish genuine parallels between paper records and records stored in computers." J. Grodsky, 31 Jurimetrics J. 17, 21 (Fall 1990).

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CONCLUSION

For the foregoing reasons, our Office determines that under FOIA the County must provide you with the property tax assessment information you requested using a computer program the County has previously created. The County may charge you \$60.00 per hour as a reasonable fee under FOIA for the direct labor costs associated with producing that information pursuant to Ordinance 04-05. The County may not charge you \$60.00 per hour for machine operating time to produce that information pursuant to Ordinance 04-05. Our Office does not believe that is a reasonable fee under FOIA because the County has not shown that the charge correlates to actual computer processing unit time. Our Office also does not believe that it is a reasonable fee under FOIA to charge you six cents for each field of data pursuant to Ordinance 04-05 because the County has not shown that copying the electronic data you requested is analogous to producing mailing labels or lists.

Our Office determines that FOIA does not require the County to provide you with property tax billing information because that would require extensive computer programming and, in effect, the creation of a new public record which FOIA does not require.

Very truly yours,

W. Michael Tupman, Esquire
Deputy Attorney General

APPROVED

Lawrence W. Lewis, Esquire
State Solicitor

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cc: The Honorable Joseph R. Biden, III
Attorney General

Richard S. Gebelein, Esquire
Chief Deputy Attorney General

Keith R. Brady, Esquire
Assistant State Solicitor

William W. Pepper, Sr., Esquire
Attorney for Kent County Levy Court

Mary Ann Haley
Opinion Coordinator